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No. 80-1208

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

NEW ENGLAND POWER COMPANY,
Appellant

v.

NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION, THE STATE OF NEW HAMPSHIRE, NEW HAMPSHIRE LEGISLATIVE UTILITY CONSUMERS' COUNCIL, THE COMMONWEALTH OF MASSACHUSETTS, AND THE STATE OF RHODE ISLAND,
Appellees

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW HAMPSHIRE

MOTION OF THE STATE OF NEW HAMPSHIRE AND NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION TO DISMISS OR AFFIRM

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MOTION TO DISMISS OR AFFIRM

The appellees State of New Hampshire and New Hampshire Public Utilities Commission respectfully move to dismiss the captioned appeal or affirm the judgment of the Supreme Court of the State of New Hampshire on the ground that the questions presented are so unsubstantial as not to warrant further argument.

SUMMARY OF ARGUMENT

New Hampshire Public Utilities Commission Order No. 14492 is not preempted by Part I of the Federal Power Act. A state law is preempted by a federal law only if it is unmistakable that the Congress has entirely

preempted the field to which the law applies, or the state law is so inconsistent with the federal law that it stands as an obstacle to the accomplishment of the objectives of Congress. Congress did not occupy the field of electric utility regulation. Sections 19, 20 and 201(a) of the Federal Power Act clearly recognize that the regulation of the field of electric utilities is to be shared between the state and federal governments. The order of the New Hampshire Public Utilities Commission does not conflict with Part I of the Federal Power Act. The objective of Congress in enacting Part I of the Federal Power Act was to provide for federal control over the development of the waterways of the United States, to the end that the uses of any particular waterway or group of waterways will be harmonious one with the other, and will not impair the use of those waterways as highways for interstate commerce. The emphasis in Part I of the Federal Power Act is over the development of projects. States are preempted from interdicting the development of a project on a waterway subject to the jurisdiction of the United States. However, the states remain free to regulate the sales of electricity which is generated at projects approved by the Federal Power Commission pursuant to Part I. Section 9 of the Federal Power Act specifically recognizes the authority of the states to regulate the sale of hydroelectric energy. There is no requirement in the Federal Power Act that electrical energy generated at projects on the waters subject to the jurisdiction of the United States be sold in interstate commerce. Consequently, Order No. 14492 is not preempted by Part I of the Federal Power Act.

New Hampshire Public Utilities Commission Order No. 14492 is a valid exercise of state authority to which the Congress has consented. The breadth and usual ex-

clusivity of the regulatory authority of the Federal Power Commission, pursuant to Part II of the Federal Power Act is irrelevant to the instant case, because the Congress has specifically provided an exception to that exclusive federal authority, and granted that authority to the states. When the Congress enacted section 201(b) of the Federal Power Act in 1935, it did so with the holding of *Public Utilities Commission v. Attleboro Steam & Electric Company* well in mind. The Congress was thus aware that states could not regulate the interstate sale of electricity at wholesale. Consequently, the Congress would not have merely saved a state statute regulating interstate sale of hydroelectric energy, for to do so would be a meaningless act. Representative William A. Rogers, the representative of New Hampshire in the United States House of Representatives, urged the passage of section 201(b) of the Federal Power Act, and in doing so characterized the language in that section in terms of a grant, and the continuation of the exercise of 22 years of regulatory authority over public utilities. Thus, the context of the enactment of section 201(b) is one of a grant of authority. The timing of the enactment of that section also indicates that it is a grant of authority. The section was enacted at the same time that the Congress amended section 23 of the Federal Power Act so as to subject virtually all hydroelectric projects to the control of the United States. Only the smallest hydroelectric projects located on the most obscure streams in New Hampshire, would be beyond the reach of the Federal Power Commission. Those projects would be regulated by the State of New Hampshire without any savings clause in Part II of the Federal Power Act. An interpretation of section 201(b) of the Federal Power Act which limited its applicability to projects not

licensed under Part I of the Federal Power Act makes that section a meaningless gesture. The regulatory authority of the State of New Hampshire to which the Congress has consented is as broad as the authority conferred upon the Federal Power Commission by section 201 of the Federal Power Act. The grant of authority to the state is found in the same section as the grant of authority to the Federal Power Commission and is also a limitation on that authority. The words of the statute itself recognize that the energy which is subject to regulation by the state "is transmitted" in interstate commerce. The Congress had in mind certain state statutes, then existing, when it enacted section 201(b) of the Federal Power Act. An examination of those statutes reveals that they are all broad regulatory statutes, including the fixing of rates, and the avoidance of contracts which are contrary to the state policy. In any event, Order No. 14492 does not regulate the sale of power outside the State of New Hampshire. It is limited to an order to sell the power generated on the Connecticut River to utilities within the State of New Hampshire. Even if the authority of the State of New Hampshire does not extend to fixing the rates at which that power must be sold, the order of the Public Utilities Commission is nonetheless valid. Under that order, the New England Power Company is required to sell the power generated at the Connecticut River hydroelectric stations to utilities in the State of New Hampshire. It is left to the Federal Energy Regulatory Commission to fix the price at which that power shall be sold. Further, in such a situation, there is no unjust discrimination within the meaning of sections 205 and 206 of the Federal Power Act. If New Hampshire has complete jurisdiction, then those sections do not apply to the sale of power in the State of New Hampshire.

If the authority of the State of New Hampshire is limited to fixing the place at which the power will be sold, the Federal Energy Regulatory Commission is bound by that determination, and may not find the order to be unjustly discriminatory.

ARGUMENT

I. NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION REPORT AND ORDER NUMBER 14492 IS NOT PREEMPTED BY PART I OF THE FEDERAL POWER ACT.

A state act is not preempted by federal law unless Congress intended to occupy the entire field wherein the state has acted, or the state act is so inconsistent with the federal law that the state act must give way. *Jones v. Rath Packing Company*, 430 U.S. 519, 525-26 (1977). It is assumed that Congress did not intend to occupy an entire field where that subject was historically regulated by the states. In order to conclude that Congress intended to occupy an entire field of endeavor, that conclusion must be unmistakable. *Id.*, at 525. A state act conflicts with federal law only if, in the circumstances of the particular case, the state act stands as an obstacle to the accomplishment of the objectives of Congress. *Id.*, at 526.

A. Congress did not, in Part I of the Federal Power Act, occupy the entire field of the regulation of electric utilities.

The regulation of electric utilities had traditionally been performed by the states. *United States v. Public Utilities Commission of California*, 345 U.S. 295, 302-03 (1953). An intention to occupy the entire field of electric utility regulation is not manifest from Part I of the Federal Power Act. To the contrary, in Part I of the

Federal Power Act, Congress specifically recognized the desirability of state authority. In section 19 of the Federal Power Act (16 U.S.C. 812) the Congress specifically provided for the regulation of intrastate sales of power generated at a licensed facility by the state in which the sale was made. While not sufficient to vest the states with authority to fix the rate at which electricity energy will be sold at wholesale in a foreign state, section 20 of the Federal Power Act (16 U.S.C. 813) constituted a Congressional recognition that the states would regulate the bulk of interstate sales. *United States v. Public Utilities Commission of California,* above, at 303. Thus, the Federal Power Commission was to regulate rates under Part I of the Federal Power Act only if a state could not. *Federal Power Commission v. Southern California Edison Company,* 376 U.S. 205, 218 (1964). Consequently, the Congress did not, by Part I of the Federal Power Act, occupy the field of electric utility regulation.

B. New Hampshire Public Utilities Commission order number 14492 does not conflict with Part I of the Federal Power Act.

If the Congress has occupied any field by the enactment of Part I of the Federal Power Act, it is the field constituting the development of the navigable rivers of the United States. The objective of the Congress in enacting Part I was to assure that that development would be in accordance with a comprehensive plan. The factors included within that objective are whether there will be a project for the development of a navigable river, where that project will be, what the design of that project will be, and what the size of that project will be. *First Iowa Hydro-Electric Cooperative v. Federal Power Commission,* 328 U.S. 152 (1946).

Order number 14492 does not inhibit the development of the Connecticut River. Unlike the situation obtaining in *First Iowa Hydro-Electric Cooperative*, above, the order of the New Hampshire Public Utilities Commission does not prohibit the development of any project on the Connecticut River. That order does not prohibit the pooling of energy pursuant to the New England Power Pool agreement. The order merely requires that the power which is generated at projects on the Connecticut River be sold within the State of New Hampshire. Part I of the Federal Power Act does not require that power generated at a licensed project be sold in a state other than the state of production. The interstate sale of power is not even a consideration. Section 10(a) of the Federal Power Act (16 U.S.C. 803) provides that, in order to obtain a license, a project must

> "... be best adapted to a comprehensive plan for the improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, and for other beneficial public uses, including recreational purposes..."

The Congress intended by that language that, by exercising federal control over the licensing of projects, the use of a particular waterway or group of waterways for various purposes, will be harmonious. Thus, the construction of a project on one part of a river, which is primarily intended to improve the recreational opportunities in the area, would not be permitted to be developed in such a way that it would cut at cross purposes to the use of the river, either at that location or elsewhere on the river, as a highway for interstate or foreign commerce. Similarly, such a recreational project would be developed in such a way so as to be compatible with the improvement of the river for water-power de-

velopment. A reading of the statute indicates that the reference to interstate and foreign commerce is to the use of the waterway as a highway, and not to the place where any power developed on a river is to be sold. *Federal Power Commission v. Union Electric Company*, 381 U.S. 90, 98 (1965).

Further, Part I of the Federal Power Act recognizes that there may be state requirements affecting a would be licensee which would prohibit the licensee from implementing the permission to develop a project, if granted by the Federal Power Commission. Section 9 of the Federal Power Act (16 U.S.C. 802) requires an applicant to submit to the Commission evidence that the applicant has complied with the requirements of the state "with respect to the right to engage in the business of developing, transmitting, and distributing power, and in any other business necessary to effect the purposes of a license under this chapter." While that section does not permit a state to veto the issuance of a license by the Federal Power Commission by requiring the applicant to apply also for a state license to develop the same project, it constitutes a recognition that the laws of the states, unrelated to permission to develop a project on a waterway, are not preempted by the federal legislation. *First Iowa Hydro-Electric Cooperative*, above, at 161. An illustration of this concept is found in the case of *State of Washington Department of Game v. Federal Power Commission*, 207 F. 2d 391, 396 (9th Cir. 1953). In that case the court held that, while the City of Tacoma need not show, as a condition of obtaining a Federal Power Commission license under Part I of the Federal Power Act, that the City had complied with the laws of the State of Washington regulating the construction of dams, that did not resolve the question as to whether

the City of Tacoma had the legal capacity to initiate and act under the license once it was granted. The court said, "[t]here may be limitations in the City Charter, for instance, as to indebtedness limitations. Questions of this nature may be inquired into by the Commission as relevant to the practicability of the plan, but the Commission has no power to adjudicate them." *Id.*, at 396-97.

Thus, it may be observed that the design of Part I of the Federal Power Act includes many areas reserved for the action of the several states. The states may act except in those areas which would prevent the issuance of a license by the Federal Power Commission. The order of the New Hampshire Public Utilities Commission now under review has no effect at all upon the issuance of a license by the Federal Power Commission. Consequently, New Hampshire Public Utilities Commission order number 14492 is not preempted by Part I of the Federal Power Act.

II. NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION ORDER NO. 14492 IS A VALID EXERCISE OF STATE AUTHORITY TO WHICH THE CONGRESS CONSENTED IN PART II OF THE FEDERAL POWER ACT.

The brief of the New England Power Company (hereinafter referred to as the "Company") contains an exhaustive analysis of the breadth and pervasiveness of the regulatory authority of the Federal Energy Regulatory Commission (the successor agency to the Federal Power Commission), and repeated assertions of the exclusivity of that regulatory authority. However, the breadth and pervasiveness of that regulatory authority is irrelevant to the question before this court, for the

Congress has carved an exception to that otherwise exclusive regulatory authority, and, in the area of that narrow exception, conferred that authority upon the State of New Hampshire.

A. Section 201(b) of the Federal Power Act (16 U.S.C. 824(b)) is a congressional consent to state regulation over the sale of power generated at hydroelectric stations.

It is well settled that a state can regulate commerce by consent of the Congress where such regulation would otherwise be impermissible. *Southern Pacific Co. v. Arizona,* 325 U.S. 761, 769 (1945). It is constitutionally permissible for the Congress to consent to regulation of interstate commerce by the states. *Prudential Insurance Company v. Benjamin,* 328 U.S. 408 (1946). The enactments of legislatures are to be interpreted so as to give effect to the intention of the legislature. *Philbrook v. Glodgett, 421 U.S. 707 (1975).*

In 1935, the Congress enacted section 201(b) of the Federal Power Act. That section, after intervening amendments, is found in its present form at 16 U.S.C. 824(b), and provides:

> "(b)(1) The provisions of this subchapter shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, *but except as provided in paragraph (2) shall not apply to any other sale of electric energy or deprive a state or state commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted over a state line.* The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided in this subchapter and subchapter III of this chapter, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facili-

ties for the transmission of electric energy consumed wholly by the transmitter.

"(b)(2) The provisions of sections 824i, 824j, and 824k of this title shall apply to the entities described in such provisions, and such entities shall be subject to the jurisdiction of the Commission for purposes of carrying out such provisions and for purposes of applying the enforcement authorities of this chapter with respect to such provisions. Compliance with any order of the Commission under the provisions of section 824i or 824j of this title, shall not make an electric utility or other entity subject to the jurisdiction of the Commission for any purposes other than the purposes specified in the preceding sentence." (emphasis supplied).

Section 201(b) is to be read in the light of the policy statement enunciated by the Congress in section 201(a) of the Federal Power Act (16 U.S.C. 824(a)), to wit: that "... Federal regulation, [is] however to extend only to those matters which are not subject to regulation by the States." *Connecticut Light and Power Company v. Federal Power Commission*, 324 U.S. 515, 527 (1945). The intention of the Congress in enacting Part II of the Federal Power Act was to preserve the authority of the states. *Id.* While the emphasized language is not that usually used by a legislature when consenting to an act, if the foregoing relationship between the sovereigns is kept in mind, an analysis of the context and timing of the enactment of the emphasized portion of section 201(b) discloses that the Congress intended to and did consent to the exercise by the State of New Hampshire of regulatory authority over hydroelectric power generated within the state.

In 1927, the Supreme Court of the United States had declared that the states were prohibited by the commerce clause from regulating the rates for the interstate sale of electric energy at wholesale. *Public Utilities Com-*

mission v. Attleboro Steam & Electric Company, 273 U.S. 83 (1927). In reaching that conclusion the Supreme Court relied heavily upon its earlier case of *West v. Kansas Natural Gas Company*, 221 U.S. 229 (1911). In *West*, the Supreme Court had held that a state was prohibited by the commerce clause from preventing the introduction of natural gas into interstate commerce. U.S. Constitution, Art. I, section 8, Cl. 3. It was to fill that regulatory gap that the Congress enacted Part II of the Federal Power Act, conferring that regulatory authority upon the Federal Power Commission. *U.S. v. Public Utilities Commission of California*, above, 307-08. Consequently, at the time it enacted section 201(b) of the Federal Power Act, Congress knew that the states could not regulate the interstate sale of electric energy. When Congress enacted the original water power act, in 1920, it had provided in section 20 of that act (16 U.S.C. 813) for the states to regulate the interstate sale of electric power generated at hydroelectric facilities licensed by the Federal Power Commission pursuant to that act. At the time the Congress enacted section 201(b) of the Federal Power Act in 1935, it was aware that its earlier language in section 20 of the water power act had not been effective to grant to the states the authority to regulate interstate sales of electricity. *Federal Power Commission 9th Annual Report*, 119, 123-24; *Public Utilities Commission v. Attleboro Steam & Electric Company*, above. With the knowledge of the states' inability to regulate interstate sales of electricity, and the ineffectiveness of their earlier enactment, the Congress could not have intended to enact another illusory "savings" provision. Rather, the Congress must have intended to confer authority upon the states, as the Congress knew that in the absence of such a grant, the states had no

authority. Consequently, the emphasized portions of section 201(b) of the Federal Power Act must be construed as a consent to state regulation of hydroelectric energy.

The emphasized language was not in section 201(b) of the Federal Power Act at the time it was introduced in the House of Representatives after passage by the Senate. That clause was inserted by the house committee. *H.R. Rep. No. 1318*, 74 Cong. 1st. Sess. p. 27 (1935). That clause, as recommended by the committee, was approved by the House of Representatives upon the urging of New Hampshire Representative William A. Rogers. In urging his colleagues to adopt the emphasized portion of section 201(b), Representative Rogers said:

> "Just one further word. I do want to call attention, if I have a moment, to the fact that as a result of the service rendered by the junior senator from New Hampshire [Senator Fred H. Brown] on the public service commission of our state, we for a long time, have had a public service commission which properly protects the rights of the citizens as against these damnable curses [public utility companies]; but the senate bill as originally drawn would deprive certain states, I think five in all, of certain rights which they have over the exportation of hydroelectric energy which is transmitted across the state line. This situation has been taken care of by the house committee, and I hope when you come to it, section 201 of Part II, that you will grant us the privilege to continue, as we have been for 22 years, to exercise our state right over the exportation of hydroelectric energy transmitted across state lines but produced up there in the granite hills of old New Hampshire. (applause) (Here the gavel fell) 79 Cong. Rec. 10527.

There are several significant points contained in the address of Representative Rogers. He referred to the regulation of public utilities by the New Hampshire

Public Service Commission, the predecessor of the present-day Public Utilities Commission. He referred to that regulation for 22 years prior to his address in 1935. That is, regulation in the period 1913 to 1935. RSA 374:35 and 36 were enacted in 1913 as amendments to the 1911 public service commission act. Laws 1913, 145:17. That is the significance of the word "lawfully" in the emphasized portion of section 201(b). The word lawfully refers to state statutory law, as compared to inherent authority, and is a limiting characteristic in the grant, to wit: only states which have demonstrated a willingness to regulate hydroelectric energy by providing statutory law to that end, were to receive the benefit of the grant. Representative Rogers indicated that that statutory law in New Hampshire produced regulation by the Public Service Commission which had as its purpose the protection of the rights of New Hampshire's citizens against the public utility companies. Representative Rogers asked his colleagues to permit the state to "continue" to "exercise" that regulatory authority notwithstanding the grant of regulatory authority to the Federal Power Commission. Lastly, it is significant that Representative Rogers used the word "grant" when asking his colleagues to permit the state to so continue. Since Representative Rogers went to such lengths to explain the desirability of the emphasized portion of section 201(b) in terms of state regulation of public utilities, which rationale was approved by his listeners, as indicated by the applause, the emphasized portion of section 201(b) must be a consent to continue state regulation. To hold otherwise would render the clause a meaningless gesture, for in the absence of a grant, the states would not be able to "continue" to exercise their regulation over hydroelectric energy. When the em-

phasized portion of section 201(b) is read in conjunction with the policy statement set forth in section 201(a), and in the context of the remarks of its proponent, it is clear that the Congress intended to consent to state regulation of hydroelectric energy.

The timing of the enactment of the emphasized portion of section 201(b) of the Federal Power Act also indicates that the Congress intended to consent to state regulation of hydroelectric energy. By the Rivers and Harbors Appropriation Act of 1899, Congress had prohibited the construction of any hydroelectric projects in navigable waters without its consent. 33 U.S.C.A. 403. By section 4(d) of the Water Power Act (16 U.S.C. 797(e)), the Congress conferred upon the Federal Power Commission the authority to grant that consent. The requirement for a permit extended only to navigable streams. Section 23 of the Water Power Act, as originally enacted in 1920, provided that any person intending to construct a project on a river, other than a navigable river, could in his discretion, file a declaration of that intention with the Federal Power Commission, which would then proceed to determine whether the project was to affect interstate commerce. If the Federal Power Commission found that the project would affect interstate commerce, a permit was required. 41 Stat. 1075 (1920). Consequently, just prior to 1935, a federal permit was not required for projects on non-navigable waters. However, in the same session law wherein the Congress enacted the emphasized portion of section 201(b) of the Federal Power Act, the Congress also amended Part I of the Federal Power Act so as to provide that all persons were required to file with the Federal Power Commission a declaration of inten-

tion to construct a project on any waterway in the United States. If the Federal Power Commission found the waterway to be a navigable water of the United States, or if the Commission found that the project would affect interstate commerce, a permit was required. 49 Stat. 838, 16 U.S.C. 817. Consequently, at the time the Congress enacted the emphasized portion of section 201(b) of the Federal Power Act, it expanded the licensing authority of the Federal Power Commission to include virtually all waterways in the United States. Any project that was so small that it would not require a Federal Power Commission license, would not be generating any power for sale in interstate commerce at wholesale. Any power generated would be limited to intrastate commerce. Such commerce was committed to the sole regulatory authority of the states by sections 19 and 201(b) of the Federal Power Act. 16 U.S.C. 812, 824(b). It would make no sense to merely grant an exception from the regulation of interstate commerce by the Federal Power Commission, as the Company suggests, to those small hydroelectric projects which wouldn't be regulated by the Federal Power Commission anyway.

Further, at the time the Congress enacted the emphasized portion of section 201(b), in 1935, the Connecticut River was navigable in fact. *Bellows Falls Hydro-Electric Corporation*, 2 F.P.C. 380, 385-86 (1941). Consequently, at the time of the enactment of section 201(b) the Connecticut River was already within the licensing jurisdiction of the Federal Power Commission. However, Representative Rogers, who urged the enactment of the emphasized portions of section 201(b), must have been aware that the State of New Hampshire had specifically included the Connecticut River within

the scope of RSA 374:35 and 36. This is so because Representative Rogers' cohort in securing the passage of the emphasized portion of section 201(b), Senator Fred H. Brown, had served for a long time on the New Hampshire Public Service Commission. Senator Brown would have known that RSA 374:35 and 36, as originally enacted in 1913, contained an express exclusion of the Connecticut River from its terms. Laws 1913, 145:17. However, in 1926, that exclusion of the Connecticut River was dropped from the statute. P.L. 240:33. Consequently, in the face of a patent desire on the part of the State of New Hampshire to control the sale of hydroelectric energy from projects on the Connecticut River, which was sheperded through the Congress by two of the state's representatives to the Congress, it is not possible that the Congress intended merely to not interdict the state's authority over hydroelectric projects on waterways other than the Connecticut River.

Considering section 201(b), in the light of the policy statement set forth in section 201(a) of the Federal Power Act, and in the light of the timing of its enactment, the Congress must have intended to consent to the regulation of hydroelectric energy by the State of New Hampshire.

While not useful to understanding the intent of the Congress in 1935, the 1978 amendments to the Federal Power Act disclose an understanding by the 1978 Congress that the states then retained authority over the exportation of hydroelectric energy. In 1978, the Congress added what is now 16 U.S.C. 824a-1 to the Federal Power Act. By that section, the Congress authorized the Federal Energy Regulatory Commission

(the successor to the Federal Power Commission) (FERC) to exempt electric utilities from any provision of state law which would prohibit such a utility from participating in an area pooling arrangement such as the New England Power Pool. The statute recognizes that there are state laws which would prohibit the exportation of electrical energy which have not been pre-empted by the force of the Federal Power Act alone. Those laws are the state laws preserved by section 201(b) of the Federal Power Act (16 U.S.C. 824(b)). This is made clear when one observes that, after the 1978 amendments, section 201(b)(1) of the Federal Power Act, in pertinent part, provides that Part II of the Federal Power Act, "... *except as provided in paragraph (2)* shall not ... deprive a state or state commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted over a state line." 16 U.S.C. 824(b)(1). In paragraph (2) of that section, it is provided that sections 210-212 of the Federal Power Act (16 U.S.C. 824i, 824j and 824k) shall deprive a state of its control over hydroelectric energy. Those latter sections provide for the mandatory interconnection of utilities and the involuntary wheeling of power over the transmission lines of a nonproducing utility.

In view of all of the foregoing, the emphasized clause in section 201(b) of the Federal Power Act must be interpreted as the consent of the Congress to the regulation of hydroelectric energy by the State of New Hampshire.

B. The scope of the regulation of hydroelectric energy by the State of New Hampshire to which the Congress has consented is as broad as the authority which is otherwise conferred upon the Federal Power Commission by section 201 (b)(1) of the Federal Power Act.

That the authority delegated to the states is as broad as that otherwise conferred upon the Federal Power Commission is apparent from the words of section 201(b). The grant of authority to the states is contained in the same section as the grant of authority to the Federal Power Commission. The effect of the grant of authority to the states is to exclude the Federal Power Commission from that authority because the federal regulation extends "only to those matters which are not subject to regulation by the states." 16 U.S.C. 824(a).[1] Further, the statute itself recognizes that the authority of the states shall be exercised over energy "which *is transmitted over a state line.*" 16 U.S.C. 824(b)(1). Thus, the authority of the State of New Hampshire over hydroelectric energy extends to the transmission and sale of that energy in interstate commerce.

In order to determine the scope of the grant of authority to the states it is also useful to look to the statutes preserved by section 201(b) of the Federal Power Act. They are NH RSA 374:35 and 36, Wisconsin Statutes, 1931 edition, section 31.27, and West Virginia Acts, (1929) Ch. 58, sections 3(j) and 6(f). *Safe Harbor Water Power Corporation*, 5 F.P.C. 221, 235 (1946). The New Hampshire statute, RSA 374:35 and 36, makes provision for the determination of reasonable rates for hydroelectric energy. Further, while those sections are now contained in the general regulation chapter of the Revised Statutes Annotated, they were originally enacted as an integral part of the Public Service Commis-

[1] The comment in *United States v. Public Utilities Commission of California*, above, at 300, that the section 201(b) grant of authority to the state does not appear to extend to ratemaking, is dictum. Its presence in a footnote indicates that that clause was not at issue in that proceeding.

sion Act at the same time, and in the same session law, as the enactment of ratemaking provisions now contained in Chapter 378 of the Revised Statutes Annotated. Laws 1913, 145. The Wisconsin statute provides for the determination of a reasonable rate for hydroelectric energy. The statute further provides that the Public Utilities Commission has the power to declare void any contracts for the sale of hydroelectric energy which may have been entered into by the public utility. Wis. Stat. (1931) sec. 31.27. The West Virginia statute provides for the fixing of rates (section 3 (j)), and for the preference of West Virginia citizens as to the use of the power generated by the utility, which may be enforced by the commission by "appropriate orders." W. Va. Acts (1929) Ch. 58, sec. 3(j) and 6(f). Thus, the statutes intended to be preserved by the Congress when it enacted section 201(b) of the Federal Power Act provide for the fixing of rates, or are part of an overall rate regulatory scheme including the fixing of rates. Consequently, the scope of authority conferred upon the states by that section includes the authority to fix rates and generally regulate the transmission and sale of hydroelectric energy.

The same conclusion is reached when section 201(b) is viewed in relation to Part I of the Federal Power Act. Under Part I, the sale of hydroelectric energy from the Connecticut River projects to other utilities in the State of New Hampshire, even at wholesale, would be an intrastate sale subject to the regulation of the state commission pursuant to section 19 of the Federal Power Act (16 U.S.C. 812). Since the state could regulate those sales prior to 1935, the intention of the Congress to continue the authority previously exercised by the states after the enactment of Part II of the Federal Power Act,

includes an intention to permit the states to regulate intrastate sales of hydroelectric energy at wholesale, even though the provider of that energy or the recipient of that energy is interconnected with other electric utilities located outside the State of New Hampshire. Compare *Public Utilities Commission v. Attleboro Steam & Electric Company*, above, and *Federal Power Commission v. Southern California Edison Company*, above.

Even though the authority delegated to the State of New Hampshire extends to the regulation of sales of power generated in the State of New Hampshire but transmitted outside of the State of New Hampshire, New Hampshire Public Utilities Commission Order 14492, under review in this proceeding, does not regulate the sale of power outside the State of New Hampshire. The order of the Commission required the Company to sell the hydroelectric power in the State of New Hampshire. Contrary to the suggestions of the Company, there is no need to sever wires in order to sell that power in New Hampshire. Indeed, the continuation of the New England Power Company in the New England Power Pool, and the pooling of the energy generated on the Connecticut River, are not inconsistent with the sale of that energy in the State of New Hampshire. The New England Power Company presently sells the power generated on the Connecticut River under contract to utilities located in Massachusetts and Rhode Island, yet pools that energy in the New England Power Pool.

In view of the wording of section 201(b) of the Federal Power Act, its relation to Part I of the Federal Power Act, and the provisions of the statutes it was intended to preserve, New Hampshire Public Utilities Commission Order No. 14492 is well within the scope of

the authority delegated by the Congress to the State of New Hampshire.

C. New Hampshire Public Utilities Commission Order 14492 is valid even if the regulatory authority of the State of New Hampshire to which the Congress consented in Part II of the Federal Power Act does not extend to rate fixing.

New Hampshire Public Utilities Commission Order 14492 does not invade the exclusive rate fixing authority of the Federal Energy Regulatory Commission. The order of the New Hampshire Public Utilities Commission requires the Company to sell the power generated on the Connecticut River to entities in the State of New Hampshire. That order does not fix the rate at which the sale will be made. Because the State of New Hampshire has the authority to require that the power previously sold out of the state be sold within the state, as has been established by Part II.A. of this argument, the New Hampshire Public Utilities Commission can order such a sale, and leave it to the Federal Energy Regulatory Commission to approve the price after the Company and other utilities in the State of New Hampshire have negotiated an agreement. The order of the New Hampshire Public Utilities Commission does not require any amendments or changes to rates or contracts in force for the sale of electric energy to persons outside of the State of New Hampshire. The order is only that the hydroelectric energy generated on the Connecticut River be sold in the State of New Hampshire. The Company might find it necessary or desirable to change those existing rates or contracts in order to maintain its profit margin. However, while that may be a consequence of the New Hampshire Public Utilities Commission order, the order does not require it. Many orders

of the New Hampshire Public Utilities Commission have consequences felt outside the State of New Hampshire. Because of the undisputed division of authority between the states and the federal government in the field of electric utility regulation, the ripple effect, both federal to state and state to federal, is common. This ripple effect is the change in the circumstances in which a regulatory body performs its regulatory function which has been brought about by the performance of the regulatory function of another regulatory body. For example, when the New Hampshire Public Utilities Commission refuses to include in the rate base of the Public Service Company of New Hampshire the cost of construction work in progress, that reduced rate base probably has an effect upon the risk of the company, and consequently an effect upon the cost of common equity to the Public Service Company of New Hampshire. A similar effect upon the cost of common equity might result from a reduction by the New Hampshire Public Utilities Commission of the rates of the Public Service Company of New Hampshire to the lower edge of the zone of reasonableness. If the Public Service Company of New Hampshire then applied to the Federal Energy Regulatory Commission for an increase in its wholesale rates, FERC would be determining the reasonableness of the requested rate increase in the circumstances of a higher cost of common equity, which was brought about because of actions of the New Hampshire Public Utilities Commission. That ripple effect has never been held to be an invasion of the exclusive rate fixing authority of the Federal Energy Regulatory Commission. In like manner, the order of the New Hampshire Public Utilities Commission to the New England Power Company to sell its hydroelectric power within the State of

New Hampshire will change the circumstances in which the Federal Energy Regulatory Commission would determine the reasonableness of the Company's rates in Massachusetts and Rhode Island, but would not be an invasion of the exclusive rate fixing authority of FERC.

The Company has also suggested, at several places in its brief, that sections 205(c) and 206(a) of the Federal Power Act (16 U.S.C. 824d(b) and 824e(a)) invalidate the New Hampshire Public Utilities Commission order as an undue preference, prohibited by those sections. (Company brief, p. 16). That argument substantially misses the point. If New Hampshire has complete jurisdiction over the sale of hydroelectric energy, including the fixing of rates, then the question of undue preference will never come before the Federal Energy Regulatory Commission. If, however, the authority of New Hampshire is limited to fixing the place wherein that hydroelectric energy will be sold, then any discrimination among the customers of the Company, be it undue or not, is not of the Company's doing, but is the exercise of a valid policy-making authority vested in the State of New Hampshire. Further, in that situation the Federal Energy Regulatory Commission would be bound by the New Hampshire Public Utilities Commission determination of the appropriate place for the sale of that energy, and would not be permitted to review that decision to determine whether it constituted an undue preference. *Connecticut Light & Power Company v. Federal Power Commission*, above. Lastly, as the Company admits, unit contracts, that is an agreement by one utility to deliver to another utility all or a fixed portion of the output of a given generating unit in exchange for the payment by the buying utility of the same portion of all of the fixed and running costs of that unit, are quite

common. It is obvious that one utility, that is one customer of New England Power Company, receives all of the benefit of the unit which is the subject of the unit contract. The Company does not explain why it is not an undue preference for the Company to enter into unit contracts generally, but would be an undue preference when that unit contract was with a utility in the State of New Hampshire. The record before this Court does not contain any information which would make that conclusion clear.

In summary, the Congress can and has consented to the exercise by the State of New Hampshire of regulatory authority over hydroelectric energy by the enactment of section 201(b) of the Federal Power Act. That conclusion is the necessary result of the words of the statute, the context of its enactment, and the timing of its enactment. The authority conferred upon the state is as broad, in its own narrow field, as the authority generally conferred upon the Federal Power Commission pursuant to section 201(b) of the Federal Power Act. That authority extends to the fixing of rates at which hydroelectric energy will be sold at wholesale within the State of New Hampshire. In any event, the order of the New Hampshire Public Utilities Commission under review in this proceeding does not fix the rates at which hydroelectric energy will be sold in the State of New Hampshire. Consequently, New Hampshire Public Utilities Commission Order 14492 is a valid exercise of state authority to which the Congress has consented by the enactment of Part II of the Federal Power Act.

CONCLUSION

For the reasons stated herein, either this appeal should be dismissed or the judgment of the Supreme

Court of New Hampshire should be affirmed.

Respectfully submitted,

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APPENDIX

STATUTORY PROVISIONS

WEST VIRGINIA ACTS (1929)

Chapter 58

Section 3(j). To regulate the rates and charges for service to consumers of electricity and other power produced by any licensee hereunder and to regulate accounts of such licensees, all as provided by chapter fifteen-o of the code of West Virginia and all acts amendatory thereof. All such rates, charges and tolls for electricity and other power produced by any licensee shall be just and reasonable, and in fixing any rate hereunder the commission shall consider the rate or rates charged by the licensee or its affiliated corporations for power produced hereunder and sold without state.

Section 6(f). Under all licenses, excepting those of railroad corporations licensed solely for their own use, the reasonable needs for electric power and energy on part of the state and consumers in this state who can reasonably be served by the licensee shall have preference as compared with the needs of others, and the commission shall have power to enforce this provision by appropriate orders.

WISCONSIN STATUTES 1931

Section 31.27. Adequate service; reasonable rates. Upon complaint by any party affected, setting forth that any grantee of a permit to develop hydraulic power and generate hydroelectric energy for sale or service to the public is not furnishing citizens of this state with adequate service at a reasonable rate in consequence of

sales of such energy outside of the state, the commission shall have power to declare any or all contracts entered into by said grantee for such sales null and void in so far as they interfere with such service or rate. Such declaration shall be made only after a hearing and investigation and a recorded finding that convenience and necessity require the sale of a specified part or all such energy within this state.